UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-35569 & 05-35570

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiff-Appellees,

and

STATE OF OREGON,

Plaintiff-Intervenor-Appellee,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendant-Appellants,

and

BPA CUSTOMER GROUP, et al.,

Defendant-Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
NO. CV-01-00640-RE

PLAINTIFF-APPELLEES' BRIEF IN OPPOSITION TO EMERGENCY MOTIONS FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1

Plaintiffs-appellees National Wildlife Federation, Idaho Wildlife Federation, Washington Wildlife Federation, Sierra Club, Trout Unlimited, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Idaho Rivers United, Idaho Steelhead and Salmon United, Northwest Sportfishing Industry Association, Salmon for All, Columbia Riverkeeper, American Rivers, Federation of Fly Fishers, and NW Energy Coalition, have no parent companies, subsidiaries or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted this 17th day of June, 2005.

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INTRODUCTION

Appellants, U.S. Army Corps of Engineers ("Corps"), Bureau of Reclamation ("BOR"), National Marine Fisheries Service ("NMFS"), and BPA Customer Group seek an emergency stay of the district court's injunction because the injunction will temporarily prevent the Bonneville Power Administration ("BPA") from generating a small amount of additional revenue from four of eight federal dams on the Snake and Columbia Rivers and because the injunction allegedly is a head-long, unprecedented, and harmful experiment in river management by the district court. While the injunction may have a small effect on power generation and electricity rates from BPA, these effects are not economically significant or legally relevant. More importantly, the lower court's injunction is not a reckless experiment in judicial activism but a tailored ruling, well-grounded in the evidence and case law under the Endangered Species Act ("ESA") by a district court that is intimately familiar with the Appellants' failed efforts to comply with the ESA and protect listed salmon and steelhead.

Appellees, National Wildlife Federation et al. ("NWF"), oppose an emergency stay because the district court did not abuse its discretion when it enjoined the Corps to allow additional water releases from four federal dams to protect migrating Snake River fall chinook (water releases, called "spill," already will occur to aid salmon passage at the other four Snake and Columbia River dams

this summer).[1] The district court carefully considered the facts and the law and enjoined appellants to allow these releases after finding that "irreparable injury will result if changes are not made." Fed. Stay Exh. A at 8 (Injunction Order). In reaching this conclusion, the court properly dispensed with each of the arguments appellants advance in their emergency motion.[2]

BACKGROUND

I. SPILL IS A BEDROCK SALMON PROTECTION MEASURE

For juvenile salmon and steelhead migrating in the Snake and Columbia rivers, including Snake River fall chinook, "spill" indisputably provides the safest way to pass the many Federal Columbia River Power System ("FCRPS") dams. See NWF Exh. 31 at 6-17 ("relative to other passage routes . . . direct juvenile

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[1] Appellants' stay request does not actually present an "emergency" within the meaning of Circuit Rule 27-3. Appellants do not – and cannot – allege that power supplies are dwindling, that any demand for electricity will go unfulfilled, or that any other genuinely irreparable harm will result in the absence of a decision in less than 21 days. Rather, an immediate decision on a stay will allow BPA – a non-party – to promptly divert river flows from salmon protection as required by the district court to power generation as BPA would prefer.

[2] As intervenor-defendant-appellant BPA Customer Group points out, BPACG Br. at vii-viii, a decision by this Court on the "emergency" motions will be, for all practical purposes, a ruling on the merits of this appeal because the district court's injunction will expire on August 31, 2005. Contrary to the BPA Customer Group's claim, this fact argues for careful application of the abuse of discretion standard to avoid any risk of harm to ESA-listed species. The district court ruled after extensive briefing, argument, and careful consideration of a lengthy administrative record. By contrast, the appellants ask this Court to decide their "emergency" motion with very limited briefing in an unnecessarily constrained time frame.

survival is highest through spillbays")("2000 BiOp"). Spilling water over these dams allows salmon to avoid traveling through the power turbines, a passage route that kills and injures these fish by subjecting them to rapid pressure changes and direct impacts with turbine blades. Id. at 9-83. Because spill has proven so effective, NMFS' past biological opinions have prescribed that "measures that increase juvenile fish passage over FCRPS spillways are the highest priority" for passage improvements, even though the government also can collect these fish and transport them down the river in barges. Id. at 9-82 (emphasis added).

A core element of the Reasonable and Prudent Alternative ("RPA") in the 2000 BiOp was the "summer spill" program, which required the Corps to spill water at one dam on the Snake River from June 21 to August 31, and at three dams on the Columbia River from July 1 to August 31. Fed. Stay Exh. A at 8-9; NWF Exh. 31 at 9-88 to 9-92. In the 2000 BiOp, NMFS calculated that even this limited summer spill would provide a substantial portion of the survival improvement required to avoid jeopardy to threatened Snake River fall chinook. NWF Exh. 31 at 6-91.

Because the survival benefits of spill are so significant and so well-established, federal, state, and tribal scientists have urged the Corps and NMFS for years to provide significant additional spill during the summer at the four dams affected by the district court injunction to further improve juvenile salmon survival

and reduce the harm to these fish. See, e.g., NWF Exh. 32 at 12 (comments from State of Oregon biologists that "[t]he benefits of summer spill for increasing survival of Snake River fall Chinook have been thoroughly documented . . . .[t]his operation will improve survival of Snake River fall Chinook" (citations omitted); see also NWF Exh. 7 at 4-5 (Joint Technical Comments); NWF Exh. 18 at 8, 15 (Idaho Comments) ("NOAAF strategy of continuing to rely only on transportation just delays attention to other strategies that may improve survival"). Analyses by NMFS also support these measures. See, e.g., NWF Exh. 9 at 38-39 (NMFS scientists concluding that spill results in high survival past dams, reduced exposure to predators, and that "lack of spill was at least partially responsible" for low salmon survival in the summer of 2001). In addition, appellees and other parties provided the district court with extensive expert testimony that increased spill this summer would reduce the harm to and improve the survival of juvenile Snake River fall chinook. See NWF Exh. 12 at ¶¶ 24-32, 36-37, 46-49 (Pettit Declaration)(citations omitted); NWF Exh. 13 at ¶¶ 7-26 (Second Pettit Declaration); NWF Exh. 14 at ¶¶ 6-13, 22-24, 29-32 (Olney Declaration); NWF Exh. 15 at ¶¶ 10-20 (Second Olney Declaration); NWF Exh. 16 at ¶¶ 6-12 (First Lorz District Court Declaration); see also Declaration of Thomas K. Lorz (June 16, 2005) (submitted herewith) at ¶¶ 8-13 (explaining that increased spill as ordered by the district court will increase juvenile salmon survival this summer);

id. at ¶ 16 & Exh. 2 (June 14, 2005 Fish Passage Center Memorandum)("[o]ur comments emphasize the unique opportunity presented by the court order to provide increased fish survival").

The request for additional spill and the analyses and evidence that support it hardly reflect a risky and dangerous management experiment. Nonetheless, such requests from fish managers to the federal appellants have fallen on deaf ears because they would limit summer power generation at the affected dams.[3]

II. PROCEDURAL BACKGROUND

This is the second time in as many years that the government has come to this Court with an emergency motion for a stay of a district court decision requiring spill of water at Snake and Columbia River dams to avoid harm to ESA-listed Snake River fall chinook. In the summer of 2004, the district court enjoined federal defendants from curtailing summer spill operations at several dams. NWF Exh. 21 at 6-9. Then as now, the chief argument against summer spill was that it is

[3] Nor can federal appellants credibly claim that measures to better protect juvenile fall chinook from harm are unnecessary because current operations are adequate. See Fed Stay Br. at 8-9. The district court concluded that Snake River fall Chinook populations are still at serious risk of extinction, Fed. Stay Exh. B at 8, 46-54, that the claim of recent improved returns lacks credible scientific support, NWF Exh. 21 at 7-8 (2004 Spill Injunction); see also NWF Exh. 33 at 38 (wild Snake River fall Chinook adult returns are projected to have fallen by almost 50% since 2001), that NMFS' own analysis shows juvenile survival is not meeting agency performance standards, NWF Exh. 6, Att. 2 at 2, and that, the species is in a "deficit situation" where measures to improve survival and reduce harm are urgently needed, Fed. Stay Exh. A at 8; NWF Exh. 21 at 6-9.

costly and already provides little benefit to migrating salmon. Id. This Court denied the emergency request. NWF Exh. 22 at 2.

Since the Court denied the previous emergency motion, NMFS issued a new biological opinion (in November 2004) that purported to evaluate the effects of operation of the federal dams on the Columbia and Snake Rivers on ESA-listed salmon and steelhead. This "2004 BiOp" was prepared in response to the district court's ruling that the 2000 BiOp was arbitrary, capricious, and contrary to law. Nat'l Wildlife Fed'n, et al. v. Nat'l Marine Fisheries Service, 254 F. Supp.2d 1196, 1211-12 (D. Or. 2003). NWF immediately sought review of the new 2004 BiOp, and on May 26, 2005, the district court granted NWF's motion for summary judgment on its claims that the opinion failed to comply with the ESA. See Fed. Stay Exh. B at 15-35 (analyzing four fundamental flaws in the 2004 BiOp).

On June 10, 2005, the district court heard oral argument on NWF's motion for an injunction to reduce the harm fall chinook would otherwise face this summer. NWF filed this motion on March 21, 2005, well before the district court's summary judgment decision, and it was fully briefed by all parties over the next two months. In its injunction motion, NWF requested that the court: (1) enjoin the Corps to allow additional spill at four Snake and Columbia river dams; (2) enjoin the Corps and BOR to improve water velocity in the Snake and Columbia by providing additional flows and/or lowering reservoir levels; and (3)

enjoin the agencies to otherwise implement the "reasonable and prudent alternative" from the 2000 BiOp. After careful consideration of these requests, the court declined to alter river flows, finding that this change in operations "requires further study and consultation," Fed. Stay Exh. A at 10 (Injunction Order). The court left the 2004 BiOp in place pending a hearing on an appropriate remand order, id. at 5-6. The court did, however, enjoin the Corps to allow additional spill this summer to improve dam passage and river conditions for juvenile salmon, reducing the harm these fish would otherwise face. Id. at 8-11.

STANDARD OF REVIEW

This Court reviews motions for a stay pending appeal under three linked standards. First, to obtain a stay pending appeal, appellants must demonstrate that: (1) they are likely to prevail on the merits of their appeal; (2) they will suffer irreparable harm if the stay is denied; (3) other parties will not be substantially harmed if the stay is granted; and (4) the public interest favors a stay. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Second, when determining whether appellants are likely to prevail on the merits of their appeal, the Court reviews the district court's grant of a preliminary injunction "for abuse of discretion," Rodde v. Bonta, 357 F.3d 988, 994 (9th Cir. 2004), a "'limited and deferential'" inquiry, id. at 995. A district court abuses its discretion only where "'it bases its decision on an erroneous legal standard or on

clearly erroneous findings of fact.'" Id. (citations omitted). "'To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish.'" Fischer v. Roe, 263 F.3d 906, 912 (9th Cir. 2001) (quoting Parts & Electric Motors, Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)). In determining whether the lower court based its decision on an erroneous legal standard, the Court reviews issues of law *de novo*, Rodde, 357 F.3d at 995, and looks to the whether the court properly applied the "arbitrary and capricious" standard of review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.[4]

Third, in this case, the standard that governs issuance of a preliminary injunction is derived from the ESA. TVA v. Hill, 437 U.S. 153, 173, 193-95 (1978). In the ESA, Congress "foreclosed the exercise of the usual discretion possessed by a court of equity." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). Accordingly, once plaintiffs have shown a likelihood of success on

[4] Under this standard, the core inquiry before the district court is whether the agencies correctly applied the law and "'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Pacific Coast Fed'n of Fishermen's Ass'ns v. NMFS, 265 F.3d 1028, 1034 (9th Cir. 2001). Courts "do not hear cases merely to rubber stamp agency actions . . . . The Service cannot rely on 'reminders that its scientific determinations are entitled to deference' in the absence of reasoned analysis . . . ." NRDC v. Daley, 209 F.3d 747, 755 (D.C. Cir. 2000) (quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995))

the merits, the balance of hardships and the public interest require an injunction. TVA, 437 U.S. at 194; Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1057 (9th Cir. 2002) ("Congress in passing the ESA removed the traditional discretion of courts in balancing the equities before awarding injunctive relief").

A district court decision to grant or deny an injunction, of course, under the ESA or otherwise is fundamentally different from APA review of whether final agency action is arbitrary or contrary to law. In considering injunctive relief, the district court is sitting in equity, weighing the facts and evidence to determine whether an injunction should issue. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-312 (1982) ("Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims") (citations omitted); see also Dade v. Irwin, 43 U.S. 383, 391 (1842)("in cases of this sort [involving equitable relief], in the examination and weighing of matters of fact, a court of equity performs the like functions as a jury"). For this reason, the parties may submit additional evidence regarding the need for relief – as they did here -- and are not limited to the administrative record. See, e.g., Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (holding that extra-record evidence is proper "in cases where relief is at issue, especially at the preliminary injunction stage.").

ARGUMENT

I. APPELLANTS ARE NOT LIKELY TO PREVAIL ON THE MERITS OF THEIR APPEAL

Appellants argue that the district court abused its discretion and misapplied the law in its injunction and summary judgment orders. Each of these claims is based on arguments Appellants made below, arguments that were carefully considered and rejected by the district court.

A. The Corps Violated Section 7 Of The ESA.

ESA § 7 includes both procedural and substantive duties. Agencies have a *substantive* duty to ensure that their actions are not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2); Conner v. Burford, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988). To help agencies comply with this substantive obligation, Congress also included a *procedural* "consultation" duty in § 7 whenever an action may affect a listed species. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (holding that ESA's procedural requirement was designed "to ensure compliance with the [ESA's] substantive provisions."). While Appellants' pretend confusion about the nature of the Corps' violations of these legal duties, see, e.g., BPACG Br. at 10 (asserting that the district court "never clearly articulates" the nature of the Corps' legal violation), the lower court's ruling that the Corps has violated § 7 of the ESA is clear and grounded in long-standing Ninth Circuit precedent. See Fed Stay Exh. A

(Injunction Order) at 6-7. Once the court concluded that the 2004 BiOp was arbitrary, capricious, and contrary to law, the Corps could not claim that it had completed the procedural steps in the consultation process necessary to ensure that it is not committing a substantive violation of law. Thomas, 753 F.2d at 764. This fundamental procedural defect in the Corps' ESA compliance is dispositive of NWF's § 7 claim against the Corps.[5]

Because the district court concluded that the 2004 BiOp is invalid in its summary judgment ruling, the Corps has not completed the procedural steps required by §7 to ensure operation of the hydrosystem will avoid jeopardy. Moreover, as the district court properly found, the Corps did not articulate any *independent* basis for concluding that its actions would avoid jeopardy. Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 989 F.2d 1410, 1415 (9th Cir. 1990) ("the Navy may not rely solely on a FWS biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2)"); Resources Ltd.

[5] As they did before the district court, Appellants attempt to narrow Thomas and its progeny to only require that agencies "engage in consultation with NOAA" regardless of whether the result of that process complies with the law. Fed. Stay Br. at 15, n.14; BPACG Br. at 11. This extraordinary view conflicts directly with Thomas and would eviscerate the substantive protections of the consultation process. Section 7 is not a paper exercise. Moreover, this theory conflicts with Court's decision in Conner, 848 F. 2d at 1458 (invalidating biological opinions covering oil and gas leasing activities and then enjoining action agency from any further surface-disturbing lease activities until adequate biological opinions were prepared).

v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993), ("[a]n agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary and capricious") (citations omitted).

The BPA Customers mysteriously contend that "the district court provides almost no justification for why the Action Agencies independently violated the APA or the ESA." BPACG Br. at 11. In a well-reasoned discussion, however, the district court explained that the Corps violated the ESA by relying solely on the 2004 BiOp to satisfy its independent duty to avoid jeopardy. See Fed. Stay Exh. A at 6-7 ("The RODs provide no specific analysis nor point to any record evidence to support the assertion that the action agencies conducted independent assessments and reached independent and rational conclusions in adopting them."); see also NWF Exhs. 23-29 (Administrative Record documents showing that the action agencies were extensively involved in the development of the 2004 BiOp). In this case, where there has been no independent analysis beyond the 2004 BiOp and where the action agencies helped to develop that opinion, the no-jeopardy conclusion in the Corps ROD is unavoidably anchored to the fate of the 2004 BiOp. Resources Ltd., 35 F.3d at 1304-05. The district court correctly concluded the Corps had violated ESA § 7 because "in substance the RODs relied on the no-jeopardy finding of the 2004BiOp without an independent rational basis for doing

so." Fed. Stay Exh. A at 6.

B. NMFS' 2004 BiOp Is Arbitrary, Capricious, And Contrary To Law.

Although they do not dispute the district court's decision that the Corps violated the ESA, federal Appellants do attack the district court's May 26, 2005 summary judgment ruling that the 2004 BiOp is arbitrary, capricious, and contrary to law. The district court concluded that the 2004 BiOp was flawed in four vital respects: (1) it failed to consider the effects from dam operations that NMFS deemed "nondiscretionary," Fed. Stay Exh. B at 16-24; (2) it improperly compared the small amount of effects it did attribute to the action against the environmental baseline, instead of considering these effects in conjunction with the effects of the baseline to make a jeopardy determination, id. at 24-29; (3) it failed to evaluate the impact of dam operations on the designated critical habitat needed for recovery of the species, id. at 29-34; and (4) it failed to address whether the action would jeopardize ESA-listed salmon because of its effects on their prospects of recovery. Because the district court correctly applied the law, Rodde, 357 F.3d at 995, to each of these "independently dispositive" legal issues, Fed. Stay Exh. B at 15, Appellants are unlikely to prevail on *any* of their claims, let alone on all four.

1. The jeopardy analysis in the 2004 BiOp is improperly limited.

The jeopardy determination in the 2004 BiOp is based on an unprecedented and narrow "framework" that ignores the ESA and its implementing regulations

and results in only a relative judgment about whether the action (as improperly limited, see infra at 19-24), when compared to a hypothetical "reference operation," will be better or worse for fish than the reference operation. As the district court properly determined, the ESA protects listed species from jeopardy and, together with the plain language of the regulations and consistent agency practice, requires a broad and comprehensive evaluation of the agency action in the context in which it actually will occur. Fed. Stay Exh. B at 24-29.

The ESA's implementing regulations detail a set of comprehensive factors and steps that NMFS must consider and complete in order to determine whether an action will jeopardize an ESA-listed species. 50 C.F.R. §§ 402.14(g)(2)-(4), 402.02. The regulatory definitions further define the effects that must be addressed in this analysis. Id. § 402.02. Specifically, the "effects of the action" that the agency must evaluate include the "direct and indirect effects of an action . . . together with effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." Id. The "environmental baseline," in turn, includes "all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone" their own consultation and any "contemporaneous" state or private actions. Id. Finally, the regulations define "cumulative effects" to include

any "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area." Id. The regulations thus prescribe a comprehensive assessment that builds a complete and realistic picture of the effects of existing actions and circumstances on the species and then adds the effects of the proposed action to this picture in order to determine whether the combination will cause the *action* to jeopardize the species.

NMFS' Consultation Handbook confirms this carefully structured and comprehensive approach. The Handbook states that when "determining whether an action is likely to jeopardize the continued existence of a species" NMFS must decide

> whether the *aggregate* effects of the factors analyzed under 'environmental baseline,' 'effects of the action,' and 'cumulative effects' in the action area – when viewed against the status of the species or critical habitat as listed or designated – are **likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat.**

NWF Exh. 11 at 4-31 (italics added, bold in original).

Appellants ignore these detailed steps that provide decisions a complete and comprehensive context and instead argue that the ESA allows NMFS to make a jeopardy determination in isolation from any other circumstances. See, e.g., Fed. Stay Exh. M at 1-8 (explaining that the 2004 BiOp "isolates the precise action, the operation of the FCRPS, from its environmental baseline."). This novel approach allowed the federal agencies to construct the 2004 BiOp around an unprecedented

and improper assessment of the "net effects" of the Updated Proposed Action ("UPA") as compared to the effects of a hypothetical "reference operation" that is supposed to – but does not actually – approximate the effects of the environmental baseline. See, e.g., Fed. Stay Exh. K at 1-12, 6-1. Appellants then claim that if the result of this comparison shows that the proposed action considered in isolation has no "net effect," the jeopardy inquiry is at an end. Id. at 1-12, 8-1 (jeopardy cannot occur if the comparison of action and reference yield a no net effect finding). Regardless of whether the "action" and this "reference operation" were correctly defined – and the district properly concluded they were not, see Fed. Stay Exh. B at 16-24 – NMFS' comparative approach erroneously removes consideration of the environmental baseline and cumulative effects from its jeopardy analysis.

In an attempt to justify this approach, Appellants rely on an unreasonable interpretation of the ESA's implementing regulations that focuses solely on the word "*action*." Fed. Stay Br. at 20-26. NWF does not argue, nor did the district court find, that § 7 requires NMFS to determine whether the total effects of an aggregation of all actions in the action area will cause jeopardy *independent of* the action. The point is simply that a determination about whether a proposed action will or will not cause jeopardy requires NMFS to evaluate the impacts of that action together with (i.e., added to) the impacts of the specific factors enumerated in the regulations, even though the jeopardy determination itself is made only for

the proposed action.[6]

The regulations and Consultation Handbook are not so ambiguous or obscure. They spell out the steps in a comprehensive jeopardy analysis that adds the effects of the action to other impacts in the action area (both the environmental baseline and cumulative effects) in order to determine whether the additional impacts of the action will cause jeopardy. Because NMFS cannot reconcile its myopic focus on the word "action" with the comprehensive analysis required by the regulations, the district court properly concluded that NMFS' interpretation of the regulations was not reasonable and deserved no deference. See Fed. Stay Exh. B at 24-29; Webber v. Crabtree, 158 F.3d 460, 461 (9th Cir. 1998) (agency's interpretation of a regulation "cannot be upheld if it is plainly erroneous or inconsistent with the regulation").

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[6] Based on the comparison of the alleged net effects of the action in isolation to a hypothetical "reference operation" construct, NMFS determined in the 2004 BiOp that the action it considered would not jeopardize any listed ESU. Compare, e.g., NWF Exh. 30 at 6-68 (assessing net effects of proposed action and predicting "no net change" for Snake River spring/summer chinook) with id. at 8-7 (making jeopardy determination based on "no change" finding). Appellants assert – tellingly without citation to the 2004 BiOp or the record – that NMFS' jeopardy analysis actually goes beyond this "no net effects" finding for each ESU in Chapter 6 and somehow considers the status of the species, environmental baseline, and cumulative effects. See Fed. Stay Br. at 27. This claim cannot withstand scrutiny. The no net effects finding for an ESU in chapter 6 and the parallel no-jeopardy finding for that ESU in chapter 8 are indistinguishable. Compare NWF Exh. 30 at 6-68, 6-76 with id. at 8-7. NMFS plainly states that any discussion of the environmental baseline and cumulative effects in chapter 8 adds no new analysis beyond the net effects determination of chapter 6. See Fed. Stay Exh. K at 8-1.

Moreover, as the district court noted, other courts have already rejected the kind of truncated, comparative jeopardy analysis that NMFS offers in the 2004 BiOp. Fed. Stay Exh. B at 27-29 (citing Kandra v. United States, 145 F. Supp.2d 1192, 1208 (D. Or. 2001) (holding that "[t]he environmental baseline is part of the entire 'effects of the action' . . . that must be considered" not something "to which other conditions are compared") (emphasis added)); see also Defenders of Wildlife v. Babbitt, 130 F. Supp.2d 121, 126 (D.D.C. 2001) ("applicable regulations require an agency to analyze the effects of its activities when added to the past and present impacts of all federal activities in the action area") (emphasis added).

Indeed, the new comparative approach NMFS employs in the 2004 BiOp has already been rejected by this Court. In ALCOA v. BPA, 175 F.3d 1156 (9th Cir. 1999), the Court specifically rejected the argument over these same dams that NMFS' jeopardy analysis should have been limited to determining whether the proposed action would have an incremental negative effect as compared to past actions:

> We agree with NMFS that the regulatory definition of jeopardy, i.e., an appreciable reduction in the likelihood of both survival and recovery, 50 C.F.R. § 402.2, does not mean that an action agency can 'stay the course' just because doing so has been shown slightly less harmful to the listed species than previous operations.

Id. at 1162 & n.6.[7] There is no legal error in the district court's summary judgment

[7] Similarly, the language in San Francisco Baykeeper v. U.S. Army Corps of

ruling on this point, and this alone is sufficient to preclude Appellants from showing any likelihood of success on the merits of their appeal.

2. NMFS has improperly limited the scope of consultation in the 2004 BiOp.

The district court also rejected Appellants' attempt to circumscribe the agency action that NMFS considered in the 2004 BiOp. Based on its interpretation of another ESA regulation, 50 C.F.R. § 402.03, Appellants assert first that the agency action for consultation is limited to only those aspects of hydrosystem operations that lie within the action agencies' "discretionary authority," see, e.g., Fed. Stay Br. at 21-23, and second, that an unspecified majority of on-going FCRPS operations and effects do not meet this criterion, id. at 24-25. NMFS has never defined precisely what the contours of these alleged "non-discretionary" operations might be, nor could it because, as NMFS candidly admits, it is impossible to tease apart the hydrosystem operations that actually meet its "discretionary authority" threshold and those that do not. Fed. Stay Exh. K at 5-5.

The plain language of § 7(a)(2) requires consultation on "*any* action authorized, funded, or carried out" by a federal agency. 16 U.S.C. § 1536(a)(2)

Engineers, 219 F. Supp.2d 1001, 1023 (N.D. Cal. 2002), and Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1217 (D. Id. 1993) cannot help Appellants. Whether phrased as "with reference to" or "given" the environmental baseline, the jeopardy analysis required by the regulations directs NMFS to *add* the effects of the action to the environmental baseline, not compare them.

(emphasis added). Consequently, the regulations define agency action as "*all* activities or programs of *any kind* authorized, funded, or carried out, in whole or in part," by a federal agency. 50 C.F.R. § 402.02 (emphasis added). Nonetheless, Appellants argue that this broad and unequivocal description of the scope of federal action is illusory because a single word in a separate regulation – the word "discretionary" – undoes what the statute and regulations otherwise so clearly require. This view is untenable as a matter of law and leads to the convoluted agency gymnastics in the 2004 BiOp as a matter of fact. The district court carefully and correctly explained why this interpretation conflicts with the ESA. Fed. Stay Exh. B at 16-24.

i. Appellants have not identified a single clear statutory limitation on their discretion.

Notably, for all of their arguments for a manufactured distinction between discretionary and nondiscretionary actions, Appellants fail to address entirely the district court's detailed analysis of the statutes that govern operation of the hydrosystem, Fed. Stay Exh. B at 18-21, and its finding that, whatever the meaning of 50 C.F.R. § 402.03, "Congress has provided the agencies with statutory authority and discretion to act for the benefit of listed species in operating the DAMS," id. at 18. As the district court correctly determined, Congress has never explicitly constrained the discretion that the action agencies have to operate the hydrosystem and has specifically granted discretion to assist fish. Fed. Stay Exh.

B at 19-21.

ii. Appellants' interpretation of 402.03 conflicts with the structure of the ESA.

Similarly, Appellants do not respond to the structural conflicts created by the agency's interpretation of 50 C.F.R. § 402.03 as an inflexible sorting requirement to exclude any non-discretionary features of an action from consideration in consultation. The ESA and its regulations very plainly require that if there is any discretionary involvement in the action that warrants initiation of consultation, further distinctions/questions about the extent of the agency's discretion are relevant only when deciding whether an action that causes jeopardy can be modified or mitigated to avoid jeopardy. Fed. Stay Exh. B at 22. Thus, under the regulations, if NMFS finds that an action will jeopardize a listed species, it must propose a reasonable and prudent alternative ("RPA") that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. § 402.02.

If there is no RPA for an action (e.g., because there is no alternative within the current authority of the federal agency that it could take to avoid jeopardy), NMFS must issue a "jeopardy" biological opinion that effectively prohibits the agency from taking the proposed action. The action agency's only recourse at that point is to accept the opinion and cease the activity or to apply to the Endangered Species Committee for an exemption from § 7. 16 U.S.C. § 1536(g); 50 C.F.R. §

402.15(b). Congress clearly grappled with questions about the scope of an agency's discretion and authority, and chose not to limit § 7 consultation to discretionary actions.[8] If consultation could never address anything but discretionary agency action as NMFS argues, none of these section 7 procedures for addressing a conflict between the limits of an agency's existing authority and the ESA would be necessary. To the contrary, those sections of the statute are not superfluous. Fed. Stay, Exh B at 22.

iii. Appellants misinterpret the case law.

The district court properly determined that the "the plain language of § 402.03 does not eliminate consultation in situations where there is some meaningful discretionary involvement or control." Fed. Stay Exh. B at 16; see also id. at 17-18 (citing and analyzing cases). Appellants mischaracterize the holdings

[8] Among other things, the unique statutory exemption process discussed above distinguishes the ESA from the CWA provisions addressed in National Wildlife Fed'n v. Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004). The question the Court addressed in that case and the issue of the scope of consultation on on-going hydrosystem operations have little in common. While NWF v. USACE may stand for the proposition that the Corps cannot exercise authority it does not have under the *Clean Water Act*, that proposition does not limit the scope of *ESA* consultation to only the discretionary pieces of a federal action where the entire action must comply with the ESA. See 16 U.S.C. § 1536(a)(2)(any federal action must avoid jeopardy). Nor does such a comprehensive consultation on a federal action require agencies to have unlimited "authority to remove" dams. Fed. Stay Br. at 25. Instead, if the effects of an action, including both its discretionary and non-discretionary components, cannot be altered within the scope of the agency's existing authority to avoid jeopardy, the ESA requires a jeopardy biological opinion for the entire action and allows resort to the ESA exemption process.

of several cases in an attempt to support the view that agency action is cleanly divided into discretionary and non-discretionary components. None of these cases can be coaxed into supporting Appellants' novel theory that "actions subject to the agencies' substantive ESA obligation[s]. . . include only actions over which the an agency has discretionary involvement or control." Fed. Stay Br. at 21. Instead, the test applied in each of these cases is whether the agency retained *any* discretion to trigger consultation in the first instance. See, e.g., NRDC v. Houston, 146 F. 3d 118, 1126 (9th Cir. 1998) (consultation required where agency had "some discretion" to consider and act for the benefit of listed species when negotiating water delivery contracts); Sierra Club v. Babbitt, 65 F.3d 1502, 1508, 1511-12 (9th Cir. 1995) (no consultation required where agency had issued permit before enactment of ESA and had no authority to reopen or modify permit to benefit species).[9] Sierra Club and its progeny merely examined and rejected a claim that the agency lacked sufficient discretion over an action to even initiate consultation. The gatekeeping function of 50 C.F.R. § 402.03 cannot be extended to apply yet

[9] Ground Zero Center for Non-Violent Action v. U.S. Dept. of the Navy, 383 F.3d 1082 (9th Cir. 2004), is not a case about the "scope of consultation." Fed. Stay Br. at 23. In that case, the Navy apparently did not address the initial presidential decision to site the Trident II missile backfit program at the Bangor sub base when it informally consulted with NMFS. The reason for this is simple: the President's actions are not subject to the ESA at all. See id. at 1092; see also 16 U.S.C. §§ 1536(a)(2); 1532(7) (term "federal agency" does not include President).

again to narrow consultation once it is initiated.[10]

The district court correctly applied the law and held that "NOAA must consult on the entire proposed action if the action agencies have meaningful discretion to operate DAMS in a manner that complies with the ESA." Fed. Stay Exh. B at 18.

3. *NMFS' critical habitat determinations are contrary to law, arbitrary, and capricious.*

In Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004) ("GP Task Force"), this Court held that NMFS must examine the impacts of an action on a species' likelihood of recovery, as well as its survival, in determining whether the action will adversely modify critical habitat. In the 2004 BiOp, NMFS concluded that the existing state of critical habitat in the Snake River was poor and would worsen in the near-term under the agencies' proposed action. Fed. Stay Exh. K at 8-7, 8-8, 8-13, 8-36. Despite this increased degradation, NMFS found that the action would not adversely modify critical

[10] One need look no further than NMFS' tortured attempt to designate a "reference operation" that would capture the purportedly discretionary limits of the action agencies authority in order to understand that NMFS' attempt to extend the reach 50 C.F.R. § 402.03 leads to absurd and meaningless results. First, NMFS admits that "it is beyond NOAA Fisheries and the Action Agencies' technical ability" to distinguish between the discretionary and non-discretionary operations. Fed. App. Mem. Exh. K at 5-5. NMFS then includes in the reference operation a mix of allegedly discretionary and non-discretionary operations and admits that the agencies would "lack the authority to implement it." Id. at 5-6. In the end, the reference operation that NMFS intended as a way to demarcate the limits of the

habitat because the agency expects that measures it will take within the next ten years will eventually improve habitat conditions. NWF Exh. 30 at 6-61 to 6-62; 6-90. The district court determined that this conclusion is contrary to the ESA and GP Task Force because NMFS' "optimism that the long-term improvements in critical habitat will offset the degradation of the habitat necessary for survival or recovery in the first five years of the 2004 BiOp is unrealistic." Fed. Stay Exh. B at 32-33 (citing PCFFA v. NMFS, 265 F.3d 1028, 1037-38 (9th Cir. 2001)).

Appellants' only response to the court's ruling is to assert in a single paragraph that the district court failed to afford NMFS appropriate deference. Fed. Stay Br. at 31.[11] This claim cannot carry Appellants' burden to demonstrate a likelihood of success on the merits in light of the district court's correct and unchallenged enumeration of at least four bases for its findings. See Fed. Stay Exh. B at 33 (noting that in its critical habitat analysis NOAA "does not analyze the significant degradation in the already poor condition of critical habitat[] in the

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agencies' discretion cannot even achieve its purpose.

[11] Federal defendants attempt to justify this anemic response by arguing that the district court did not base its injunction on this issue. Fed. Stay Br. at 31. There was, however, ample evidence before the district court that reduced spill under the proposed action was one of the factors that led Appellants to find degradation in the quality of critical habitat, Fed. Stay Exh. B at 31 (noting that reduced spill in the proposed action impairs critical habitat in the short-term), an injury that would be alleviated by increased spill, see e.g., Fed. Stay Exh. K at 8-13 ("In this case, the reduction in safe passage is due, in large part, to the operation that does not make maximum use of spillways, the safest route of in-river passage."); see also id.

context of the life cycles and migration patterns [of the listed species]," that the action agencies "have not committed to install [the dam modifications] that NOAA relies on to offset the short-term reduction in critical habitat," that "NOAA is at best 'uncertain' as to whether the short-term degradation of critical habitat will be offset by long-term habitat improvements," and that in any event NOAA "does not know '[t]he in-river survival rate necessary for recovery.'")(citations omitted)).

4. NMFS' jeopardy analysis failed to address the effects of the action on species recovery.

Finally, Appellants attack the district court's finding that NMFS' jeopardy analysis failed to evaluate the impacts of the action on the likelihood of recovery of the species. See Fed. Stay Br. at 28-31; but see Fed. Stay Exh. B at 34-35. Although Appellants attempt to paint the district court's holding on this issue as an improper "extension of Gifford Pinchot," Fed. Stay Br. at 29, the lower court's ruling is grounded squarely in the plain language of the ESA regulations which state that an action may jeopardize a species if it appreciably reduces "the likelihood of both the survival and recovery of a listed species in the wild," 50 C.F.R. § 402.02.[12]

As a threshold matter, the district court appropriately recognized that the

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at 8-12, 6-89.

[12] NWF also adopts plaintiff-intervenor-appellee's State of Oregon's arguments on this issue. See State of Oregon's Response to Federal Appellants' Motion To Stay Pending Appeal at 16-17 (filed June 17, 2005).

regulations and the agency's own Consultation Handbook require NMFS to make a determination about the impact of the action on the likelihood of a species survival and recovery in order to determine whether an action will cause jeopardy. Fed. Stay Exh. B at 34-35 (citing 50 C.F.R. § 402.02 and the Consultation Handbook at 4-35 (NWF Exh. 11)). Moreover, as the district court found, in the 2000 BiOp NMFS explicitly included effects on recovery as one prong of its jeopardy analysis to measure whether the action or the RPA would appreciably reduce the species' prospects of recovery. NWF Exh. 31 at 1-14 (2000 BiOp). Neither this recovery standard nor any other plays a part in the 2004 BiOp's no-jeopardy finding. The district court did not err in finding that Appellants had violated the requirement to consider the impacts of the action on the likelihood of recovery in conducting a jeopardy analysis.

II. AN INJUNCTION IS NECESSARY TO LIMIT IRREPARABLE HARM TO ESA-LISTED SALMON

The district court narrowed NWF's injunction request and issued a narrowly-tailored injunction that protects migrating juvenile Snake River fall chinook from harm they would otherwise face this summer under the arbitrary and unlawful 2004 BiOp. This relief is well-grounded in both the law and the facts.

A. The ESA Injunction Standard Applies To This Case.

This Court has held consistently that "[g]iven a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an

injunction . . . ." Thomas, 753 F.2d at at 764. Indeed, the presence of the listed species together with a failure to comply with the ESA's procedural requirements is sufficient to support an injunction even without proof that the action likely will harm a listed species. Id. at 763. As the Court observed, where an agency has not completed the consultation process successfully, knowledge about the effects of the action on listed species and critical habitat is necessarily incomplete and the risk of uncertainty is borne by the species, a result that is "impermissible." Id. at 764. For this reason, the "possibility" of harm to a listed species is sufficient to support an injunction. Earth Island Inst. v. U.S. Forest Serv., 351 F. 3d 1291, 1298 (9th Cir. 2003).

In light of this highly protective standard, courts in this Circuit have regularly granted injunctive relief against all or part of an agency action in order to reduce or eliminate the risk of harm to a listed species from the proposed agency action, including on-going actions. See, e.g., NWF Exh. 21 (2004 Spill Injunction); see also Pacific River Council v. Thomas, 30 F. 3d 1050, 1057 (9th Cir. 1994) (enjoining "ongoing and announced timber, range, and road projects"); Greenpeace Found. v. Mineta, 122 F. Supp.2d 1123, 1139 (D. Haw. 2000) (same).

The fact that the district court could not simply halt operation of the Columbia River hydrosystem pending compliance with the ESA does not alter the fundamental legal analysis or the standards for an injunction. Rather these

circumstances required the district court to consider tailored relief that would protect the listed species from the risk of irreparable harm to the extent possible in light of the available evidence. The argument that such relief is necessarily mandatory in nature and hence must meet a different and more strenuous standard than the one this Court has adopted for violations of the ESA, Fed. Br. at 12-14; BPACG Br. at 5-9, is untenable. Such a heightened standard would arbitrarily subject ESA-listed species that happen to be harmed by an on-going federal action that cannot be halted (even though it can be modified to reduce the risk of harm) to an increased risk of injury without any basis in the statute or case law for such a result.

Moreover, contrary to the Appellants' arguments, there is no material difference between "mandatory" and "prohibitory" injunctions. As the D.C. Circuit has observed, "[e]xperience has shown that the dichotomy [between mandatory and prohibitory injunctions] is an illusion and cannot be maintained. . . . The mandatory injunction has not yet been devised that could not be stated in prohibitory terms." United States v. Western Elec. Co., 46 F.3d 1198, 1206 (D.C. Cir. 1995).[13]

[13] In addition, even if the lower court's injunction is construed as a writ of mandamus – and it is not one – a non-discretionary duty is not the only basis for granting a mandatory injunction. Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002). Mandamus may also be "employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise

Appellants' arguments also ignore the broad power that courts retain to enforce and give meaning to their orders.[14] For example, as long ago as Lester v. Parker, 235 F.2d 787 (9th Cir. 1956), this Court upheld a district court that had "enjoin[ed] the defendants from interfering with the employment of these plaintiffs, and from declining or refusing to take steps to advise shipping companies and unions that these seamen are entitled to employment," and in addition, "direct[ed] the defendants to issue to these seamen documents showing they may be employed." Id. at 788-89. Though defendants argued that the decree "grant[ed] relief in the nature of mandamus" by ordering the defendants to take affirmative action, id. at 789, the Ninth Circuit rejected this argument, noting that the court "had the inherent power possessed by any court of equity to make [an]

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of judgment or discretion." Id. at 832 (citations omitted). In Idaho Watersheds, the district court imposed interim grazing standards while the Bureau of Land Management completed a required environmental review. Id. The district court injunction requires spill of water above flows required to generate station service at certain projects with direction to the federal agencies to use their expertise to provide a combination of operations to best implement these operations. Consequently, the agencies have prepared a detailed plan of operations to implement the injunction. See Lorz Dec. at Exh. 1 (June 16, 2005, Corps plan for implementing spill measures this summer). This approach aligns perfectly with the injunction examined and upheld in Idaho Watersheds, 307 F.3d at 833 (holding that the district court had properly "urged the BLM to proceed to the exercise of its discretion but did not direct the exercise of that discretion in a particular way").

[14] Oregon Natural Resources Council v. Harrell, 52 F.3d 1499, 1508-09 (9th Cir. 1995), an APA case cited in BPACG Br. at 7, involved an extraordinary injunction request to compel the Corps to demolish a partially constructed dam pending additional NEPA analysis. This is hardly the situation presented by the district

injunction effective, and to prevent the frustration thereof . . . ." Id. at 789-90.[15]

B. The District Court's Findings Of Irreparable Harm And Of The Need For A Limited Injunction Are Not Clearly Erroneous.

Because the district court applied the correct legal standard to NWF's injunction request, the only remaining question for this Court is whether the court's conclusions that the proposed federal action would cause irreparable harm to ESA-listed salmon and that the limited relief it granted would reduce that harm are clearly erroneous. Rodde, 357 F.3d at 994-95. Both conclusions are amply supported by the evidence.

1. Dam operations cause substantial and irreparable harm to juvenile Snake River fall chinook salmon

The district court found that operation of the federal dams and reservoirs on the Columbia and Snake rivers "contribute to the endangerment of the listed species and irreparable injury will result if changes are not made." Fed. Stay Exh. A at 8. The court went on to find that "[a]mple evidence in the record . . . indicates that operation of the DAMS causes a substantial level of mortality to migrating juvenile salmon and steelhead," id., and that "'the existence and operations of the

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court injunction to allow additional spill at four dams this summer.

[15] This also is not a case like Fallini v. Hodel, 783 F.2d 1343, 1345-46 (9th Cir. 1986), cited in BPACG Br. at 7, where the lower court's injunction lies outside the agencies' current authority or discretion. The statutes governing operation of the hydrosystem provide ample discretion as to how FCRPS operations are carried out. See Fed. Stay Exh. B at 19-22 (summary judgment ruling discussing scope of agency discretion).

dams and reservoirs . . . account[s] for most of the mortality of juvenile migration through the FCRPS . . . ,'" id. (quoting 2004 BiOp at 5-29).

These findings of irreparable harm from the proposed federal action could not enjoy more extensive evidentiary support.[16] First, the 2004 BiOp itself confirms that implementation of the proposed agency action will kill or injure between 80% and 90% of the juvenile Snake River fall chinook that migrate downstream through the dams and reservoirs this summer. 2004 BiOp, NWF Exh. 30 at 10-4, Table 10.3.[17] This assessment is consistent with past evaluations. See, e.g., 2000 BiOp, NWF Exh. 31 at 10-3, Table 10.1-1. Moreover, this exceptional level of injury would occur even *with* the collection and barging of as many juvenile salmon as possible under the proposed action. 2004 BiOp, NWF Exh. 30 at 10-4, Table 10.3 (projected take for proposed action that includes maximum summer transportation). Even the federal agencies' contrived and improper efforts in the 2004 BiOp to limit their accountability for juvenile salmon mortality to so-called "discretionary" operations shows that this limited subset of operations will

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[16] Of course, the district court is not bound by the principles of deference to agency decisions and expertise that apply to record review of final agency action but must weigh and consider the facts sitting as a court in equity in order to determine whether an injunction should issue. See Weinberger, 456 U.S. at 311-312; Dade v. Irwin, 43 U.S. at 391.

[17] Appellants failed to include this chapter of the biological opinion in their exhibits.

kill or injure 1% to 4% of all Snake River fall chinook juveniles migrating this summer. 2004 BiOp, NWF Exh. 30 at 10-2, Table 10.1. This acknowledged harm cannot be dismissed as *de minimis* under the ESA and it is irreparable. See Earth Island, 351 F.3d at 1298; National Wildlife Federation v. NMFS, 235 F. Supp. 2d 1143, 1161 (W.D. Wash. 2002).

Appellants' misguided efforts to argue that Snake River fall chinook populations are somehow rebounding under the proposed agency action, Fed. Stay Br. at 14-15; BPACG Br. at 21-22, cannot obscure this extraordinary injury. See, e.g., NWF Exh. 14 at ¶¶ 21-26 (explaining harm to fish under 2004 BiOp summer operations). As the district court carefully explained in its summary judgment ruling, the basis for the view that fall chinook populations are rebounding is a single study that is contrary to other available evidence and employs a type of analysis that the court has previously rejected as arbitrary. See Fed. Stay Exh. B at 28 & n. 12 (noting acknowledged short-term population reductions, unexplained conflict in methodology between new study showing population improvement and prior agency analyses, and citing Idaho Dep't of Fish & Game v. NMFS, 850 F. Supp. 886 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995), for rejection of "population-trend analyses whose selective reliance on data from certain periods ensures an overly-optimistic appraisal of the status of listed species"). As the court also noted, other agency analyses of whether fall chinook

populations are rebounding are much more pessimistic. Fed. Stay Exh. B at 7-9 & Attachment 1 (summarizing agency's most recent comprehensive assessment of Snake River fall Chinook which concludes that even with recent returns they are "likely to become endangered").

Further, as the court found a year ago in its 2004 spill ruling, "NOAA Fisheries has itself documented that the RPA [from the 2000 BiOp] has not been implemented as planned and the predicted survival improvements for Snake River fall Chinook juveniles have not materialized." NWF Exh. 21 at 7-8. This conclusion remains as valid and well-supported today as it was a year ago. NWF Exh. 12 at ¶¶ 39-40; Exh. 14 at ¶¶ 21-26; Exh. 15 at ¶¶ 16-20; see also NWF Exh. 33 at 38 (showing that since 2001 adult wild Snake fall chinook returns have actually decreased by almost 50%). The district court's finding of irreparable harm from the proposed federal action for which there has been no legally adequate compliance with the ESA is not clearly erroneous.

2. The district court's limited injunction will reduce the harm to juvenile Snake River fall chinook.

The district court granted only one aspect of NWF's request for an injunction to protect juvenile fall chinook this summer – increased spill at four dams. Fed. Stay Exh. A at 8-11. Like its finding of irreparable harm from the proposed federal action, the grant of this limited relief is amply supported by the available evidence and is not clearly erroneous. NWF has already explained the

compelling evidentiary basis for allowing additional summer spill to improve juvenile fall Chinook survival and reduce the harm to these fish. See supra at 2-5. The district court correctly concluded that "the proposed action analyzed in the 2004 BiOp allows for no voluntary spill at four lower Snake River and Columbia Dams" and that "[t]his restriction would not preserve even a semblance of the spread-the-risk considerations NOAA contends govern the spring migration program." Fed. Stay Exh. A at 9. Based on these findings, the court also correctly concluded that in the absence of an injunction to allow additional spill, "irreparable harm [will] result[] to listed species as a result of the action agencies' implementation of the updated proposed action." Id. It is precisely the Appellants' failure to provide voluntary spill in the summer, as it does in the spring in order to improve juvenile salmon survival, that has been the focus of federal, state and tribal fishery scientists' recommendations and that is supported by extensive evidence and analysis. See supra at 4-5 (citing these recommendations and analyses). The district court's decision to enjoin the Corps to allow these additional protective measures this summer does not lack for evidentiary support and is not clearly erroneous.[18]

[18] Nor was the district court confused as the BPA Customer Group claims. BPACG Br. at 13-14. The court correctly pointed out that since at least the 2000 BiOp, the federal agencies have promised to provide additional summer spill to, among other things, "allow for a meaningful in-river migration program against which the summer transportation program would be compared." Fed. Stay Exh. A

Nor are Appellants' remarkable claims of harm from the injunction itself supported by the evidence before the district court. First, the argument that increased spill will harm migrating juvenile salmon cannot be sustained. Spill already occurs in the summer at four of the eight Snake and Columbia River dams. Fed. Stay Exh. K at D-19. It also occurs in the spring at all eight dams. Id. at D-14. Increased spill this summer will lead to a reduction in capture and barging of juvenile salmon and a corresponding increase in migration of these fish in the river; this is a benefit -- not a detriment -- to their survival. See NWF Exh. 7 at 5 ("eliminating transportation of fall chinook and implementing a spring like spill program in summer months could provide significant increases of listed Snake River fall chinook"); see also NWF Exh. 12 at ¶¶ 42-59; Exh. 14 at ¶¶ 29-32; Exh. 15 at ¶¶ 10-15; Declaration of Thomas Lorz (June 16, 2005) at ¶¶ 8-13 (submitted herewith).[19] As the Fish Passage Center ("FPC") that serves as a technical

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at 9. This increased summer spill, however, has never materialized despite repeated requests for it from other federal, state and tribal fish managers. See, e.g., NWF Exh. 14 at ¶¶ 8-13, 29 (Olney Dec.); NWF Exh. 15 at ¶¶ 10-15 (Second Olney Dec.)

[19] Appellants make much of the lower river flows expected this summer as justification for avoiding any additional spill or in-river migration of juvenile salmon. Fed. Stay Br. at 15-16; BPACG Br. at 14-15. The record evidence does not support this view. First, state and tribal fish managers have requested summer spill to benefit fish despite low summer flows because the scientific evidence supports this measure. See, e.g., NWF Exh. 14 at ¶ 15; NWF Exh. 32 at 12. Second, NMFS own model indicates that salmon survival would improve with summer spill even with the flows expected in 2005. Lorz Dec. at ¶¶ 8-13 & Exh. 2

resource for all of the federal, state, and tribal fish management agencies in the Columbia basin has observed with respect to the district court injunction, "[o]ur comments emphasize the unique opportunity presented by the court order to provide increased fish survival and to explore questions regarding summer spill and fish passage that have not been possible to date because of the federal operators' reluctance to provide spill." Lorz Dec., Exh. 2 at 1 (emphasis added). The FPC's conclusion corroborates and confirms the extensive evidence that additional spill this summer is likely to increase salmon survival and reduce the harm they would otherwise face.[20]

In sum, both the district court's findings of irreparable harm from the proposed federal action and its decision to enjoin the Corps to allow additional

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at 1.

[20] The appellants other claims of harm from the injunction, Fed. Stay Br. at 15-18; BPACG Br. at 22-26, are likewise insubstantial. As NWF explained to the district court, (1) high levels of dissolved gas are unlikely to develop this summer even with additional spill, and (2) NWF did not seek summer spill that would increase dissolved gas to harmful levels. See, e.g., NWF Exh. 12 at ¶ 49 (Pettit Dec.); see also NWF Exh. 16 at ¶¶ 29-36 (First Lorz Dec.). The Corps has confirmed the first point, see Lorz Dec., Exh. 1 (Corps' implementation plan for injunction also filed with the district court on June 17, 2005) (noting that dissolved gas is a potential issue only in the tailrace at Lower Monumental dam), and the Corps and NWF, based on the technical advice of all of the fish management agencies, have developed and agreed to a plan for implementation of the injunction that will avoid even these limited dissolved gas problems, id. This plan also addresses modification of research efforts planned for the summer salmon migration season to allow these efforts to proceed. Id.

spill this summer at four dams on the Snake and Columbia rivers to reduce the risk of harm to ESA-listed Snake River fall chinook are well-supported and not clearly erroneous.

3. The public interest supports the district court injunction.

Once the district court found a violation of the ESA and the risk of irreparable harm to a listed species, the ESA required the court to issue an injunction to reduce that risk. Appellants attempt to inject economic factors into this clear requirement by arguing that the district court did not give enough weight to the public interest in generating additional money. Fed Stay Br. at 31-32; BPACG Br. at 18-21. This argument is wrong on at least two fronts.

First, the ESA simply does not provide for such considerations when dealing with actions that will harm species threatened with extinction. Sierra Club v. Marsh, 816 F.2d 1376, 1386-87 (9th Cir. 1987) (ESA dictates that any risk "must be borne by the project, not by the endangered species"); TVA, 437 U.S. at 184 ("it would be difficult for a court to balance the loss of a sum certain – even $100 million – against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.").

Second, the contention that the public interest in the rates BPA charges for its electricity outweighs the harm to ESA-listed Snake River fall chinook is flatly

incorrect. The additional power that could be generated by water that will be spilled at four dams under the injunction will save ratepayers only pennies a month. NWF Exh. 4 at ¶ 7. In addition, contrary to the Norman Declaration at ¶¶ 4-10, the "costs" of power generation that does not occur in order to protect listed species would have a very modest impact on BPA's rates, NWF Exh. 4 at ¶ 7 (Sheets Declaration); there is an ample regional power supply, id. at ¶ 13; rates are already well below those elsewhere, id. at 12; and recent rate increases are the product of risky and incorrect market choices by BPA, not measures to protect ESA-listed salmon and steelhead. See NWF Exh. 20 at iii & Cover Letter (BPA acknowledging that higher power rates are a result of its own decision to contract for more power than it could generate). Other economic effects of an injunction are likely to be minor and can be effectively mitigated in any event. See NWF Exh. 3 at ¶¶ 8-14 (Niemi Declaration).

CONCLUSION

For all of the foregoing reasons, the Court should deny the emergency motions for a stay of the district court's injunction.

Respectfully submitted this 17th day of June, 2005.

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for plaintiffs-appellees National Wildlife Federation, Idaho Wildlife Federation, Washington Wildlife Federation, Sierra Club, Trout Unlimited, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Idaho Rivers United, Idaho Steelhead and Salmon United, Northwest Sportfishing Industry Association, Salmon for All, Columbia Riverkeeper, American Rivers, Federation of Fly Fishers, and NW Energy Coalition, are not aware of any related cases.

Respectfully submitted this 17th day of June, 2005.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On June 18, 2005, I served a true and correct copy of documents listed below, and by the method identified, on the parties listed:

1. Plaintiff-Appellees' Opposition to Emergency Motion for A Stay Pending Appeal;

2. Plaintiff-Appellees' Exhibits In Support of Opposition to Emergency Motion For a Stay Pending Appeal;

3. Motion to Exceed Page Limits;

4 Plaintiffs-Appellees' Supplemental Attachments to Opposition to Emergency Motions for a Stay.

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I, Sandra Wagner, declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of June, 2005, at Seattle, Washington.

Sandra Wagner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-35569 & 05-35570

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiff-Appellees,

and

STATE OF OREGON,

Plaintiff-Intervenor-Appellee,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendant-Appellants,

and

BPA CUSTOMER GROUP, et al.,

Defendant-Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
NO. CV-01-00640-RE

SUPPLEMENTAL ATTACHMENTS TO OPPOSITION TO EMERGENCY MOTION FOR A STAY

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Index to Supplemental Attachments

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-35569 & 05-35570

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiff-Appellees,

and

STATE OF OREGON,

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v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendant-Appellants,

and

BPA CUSTOMER GROUP, et al.,

Defendant-Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
NO. CV-01-00640-RE

DECLARATION OF THOMAS K. LORZ

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I, THOMAS K. LORZ, STATE AND DECLARE AS FOLLOWS:

1. I have twice submitted written testimony in this case in the district court in support of Plaintiffs' Motion for Injunction regarding 2005 summer operations of the Federal Columbia River Power System. These declarations are Exhibits 16 and 1 to the plaintiffs' opposition to the stay motion ("NWF Exh. __"). My qualifications are described in NWF Exh. 16 at ¶¶ 1-5.

2. As discussed in my first declaration in support of an injunction, I participate in numerous technical forums of the salmon co-managers, particularly forums regarding fish passage configurations and operations. NWF Exh. 16 at ¶ 4. In the course of these activities, I have reviewed and worked with many models for assessing river operations including the SIMPAS model and have performed SIMPAS model evaluations of various alternative river operations. Id.

3. I submit this declaration to address the assertion in the briefs and declarations filed in support of requests to stay the district court's injunction, e.g., Ninth Circuit Declaration of Gregory K. Delwiche at ¶¶ 3-8, that increased summer spill at four dams on the Snake and Columbia Rivers as ordered by the district court will harm juvenile Snake River fall chinook that migrate down these rivers this summer. These assertions expand on

statements in prior declarations from, among others, Christopher L. Toole and Cynthia A. Henriksen. See BPA Customer Group Stay Exh. S; Federal Stay Exhs. E & F.

4. For example, the reply declaration from Mr. Toole provided by the BPA Customer Group attempts to demonstrate that the increased spill the plaintiffs sought in their injunction motion would be worse for juvenile salmon survival than operations under the 2004 BiOp. As I explain below, this analysis reaches a conclusion that is contrary to years of scientific analysis that support improving river conditions in order to increase salmon survival, is incomplete, and seeks to exploit aspects of the SIMPAS model structure to support an implausible conclusion. Apart from this issue, I also address a number of other smaller points raised in declarations the federal agencies have submitted as exhibits in support of their motion for a stay. Finally, I provide up-to-date information about implementation of the district court's injunction order to show that it is and can be implemented without causing water quality problems or interfering with research the federal agencies hope to conduct this summer. This information also confirms that increased spill this summer will reduce the harm juvenile fall chinook would otherwise face.

5. In his reply declaration in the district court, Dr. Toole asserts that he has identified several "errors" in the SIMPAS analysis I completed and submitted with my first declaration. My analysis compares 2005 juvenile fall chinook system survival associated with a set of operations that would meet the plaintiffs' request for injunction relief (on the one hand) to survival estimates for implementation of the Updated Proposed Action (UPA) this summer (on the other hand). NWF Exh. 16 at ¶¶ 6-12. I address these alleged "errors" briefly below.

6. As explained in my declaration and in the administrative record, the SIMPAS model has significant limitations. The 2004 BiOp, at pages D-4 to D-8, Fed. Stay Exh. K at D-4 to D-8, recognizes that there is a great deal of uncertainty about the predictive capability of SIMPAS and that SIMPAS is best used in a comparative fashion. Among the model's limitations is the manner in which the model treats flow/survival information. Id. at D-7. The differences between the SIMPAS analysis described in the Toole reply declaration and in my declaration can be primarily ascribed to how the model calculates pool mortalities from the flow survival relationship data for any particular flow year.

7. Dr. Toole indicates that a "significant problem" with my SIMPAS analysis is my use of the 2001 water year to represent anticipated

2005 conditions, and that the year 2001 is now – no longer – representative of summer flows for 2005. BPA Customer Group Exh. S at ¶ 13. At the time of my analysis, the predicted summer flow *was* closer to the 2001 flows and thus 2001 was the proper year for calibrating my analysis. BPA concurred with these predicted low flows. Fed. Stay Exh. J at ¶ 6. Actual flows this summer likely will fall between 2001 and 2003 flows.

8. In my SIMPAS analysis based on 2001 flows, I found using a range of "D" values a 136 – 360% juvenile system survival improvement under the operations put forward as meeting the plaintiffs' requested relief (which included three components -- flow, spill and drawdown) as compared to this summer's operations under the UPA.[1] For spill alone, I found a relative improvement of 17-106% across a range of "D" values. Dr. Toole indicates that using 2003 flows in the model, he found that the relative survival difference under plaintiffs' proposed spill operations is 26-48% lower than the system survival under the UPA operations. See BPA Customer Group Exh. S at ¶ 18. Dr. Toole does not attempt to explain why

[1] Dr. Toole provides a brief explanation of "D" in his reply declaration. See BPA Customer Group Exh. S at ¶¶ 9. Essentially, "D" is a discount value applied to the survival of fish that are transported in barges because these fish do not return as adults at rates similar to fish that migrate in the river even though barging gets these juveniles to the Columbia River estuary with very high survival rates.

SIMPAS when evaluated with 2001 operations data shows large survival increases associated with plaintiffs' relief request and when evaluated with 2003 operations data shows decreases, although these unusual results should cause Dr. Toole some significant concern.

9. The different SIMPAS analysis results for comparing injunction operations to UPA operations can be attributed to problems associated with calibrating the model's pool mortality and flow survival parameters to one particular year's flow conditions and then using the model to consider a different year's flow condition. SIMPAS is based on a flow/survival relationship that assumes survival will increase consistently with increasing flows, an assumption that is well-established and has broad scientific support and many years of research behind it. When operations at a flow to be evaluated with SIMPAS (e.g., operations under the injunction and UPA in 2005) are different than the base flow used for calibration of the model (2003 in Dr. Toole's analysis), SIMPAS uses the flow/survival relationship to adjust pool survival values, either downward if the base flow is *greater* than the assessed year flow (i.e., when using 2003 in this case), or upward if the base flow is *less* than the assessed year (i.e., when using 2001 flows). Based on the way this assumption is implemented in the structure of the SIMPAS model, however, it is possible to produce SIMPAS outputs that are

counter-intuitive as Dr. Toole has done. As has been demonstrated here, the same operations and flows can produce very different model results from SIMPAS depending on the base year used to calibrate the model. This confirms the highly sensitive nature of the model to the flow/survival relationship and the potential biasing effect of the year selected as the basis for the model study. What these results do *not* do is show that increased spill this summer as allowed by the injunction will harm migrating juvenile salmon.

10. To further consider this calibration problem as related to 2005 operations under the injunction and the UPA, I performed a sensitivity analysis using SIMPAS to assess the effects of the plaintiffs' requested relief, independent of the flow-survival calibration built into SIMPAS. I did this by setting the expected pool mortality in 2005 to be equal to that which actually occurred in 2003, but otherwise used flow levels currently predicted for 2005. This analytical step removes the difference in outcomes attributable to the flow-survival calibration built into the SIMPAS model. Using SIMPAS in this fashion shows an approximate 45.8% increase in relative survival associated with operations consistent with Plaintiffs' spill request verses spill operation under the UPA at the accepted average "D" value of 0.20.

11. Dr. Toole's results also cannot be attributed to correction of the additional "errors" identified in his declaration regarding my SIMPAS analysis. The incorrect spill levels identified by Dr. Toole, paragraph 15, if incorporated in my initial SIMPAS analysis would further favor the plaintiffs' operations. The 97.5 value for Ice Harbor dam instead of .975 was an incorrect value erroneously included on the input sheet I sent to defendants in my effort to get them my inputs within 24 hours of their request. The correct .975 value was used in the calculation. Regardless the model would automatically use 1.0 instead of the 97.5, and this would generate an insignificant difference.

12. As indicated in my first declaration, SIMPAS has its limitations. The above discrepancy between my analysis and the limited analysis of Dr. Toole only underscores the problem with using SIMPAS. While I agree with Dr. Toole that SIMPAS is not able to estimate absolute system survivals, if the system survivals in the model are in the range Dr. Toole estimated in his limited analysis with the questionable pool mortality assumptions, the best system survival NMFS estimates using the most favorable D, 0.41, is only 14.5%, which is dangerously low. Using a D = 0.18 the system survival as reported by Dr. Toole is only 6.5%. These are both poor system survivals. As discussed below, the available scientific

evidence – as well as NMFS' own findings – indicate that additional spill is better for migrating juvenile fish and would increase the dangerously low system survival rates calculated by Dr. Toole.

13. Quite apart from the limited SIMPAS modeling that Dr. Toole offers, the broad conclusion he attempts to reach based on it – that increased summer spill would be worse for salmon than standard operations under the UPA – are contrary to the basic science, including the flow-survival relationship described in the 2004 BiOp itself and noted by Mr. Toole in his declaration. Fed. Stay Exh. K at D 3-16; BPA Customer Group Exh. S at n. 5. As the plaintiffs' and tribal declarants previously discussed, regional salmon biologists agree that more flow and more spill are needed for salmon survival. NWF Exh. 13 at ¶¶ 5-11 (Second Pettit Declaration); NWF Exh. 14 at ¶¶ 6-134 (Olney Declaration).

14. Dr. Toole also notes the uncertainty associated with transportation of Snake River fall chinook. BPA Customer Group Exh. S at ¶¶ 9, 10, 21. Likewise, Dr. Toole expresses concerns with the uncertainty of the data in general. BPA Customer Group Exh. S at ¶ 20. Plaintiffs' and tribal declarants previously discussed the scientific basis and regional support for additional summer spill and "spread-the-risk" operations. NWF Exh. 14 at ¶¶ 6-13 (Olney Dec.); NWF Exh. 15 at ¶¶ 10-15 (Second Olney

Declaration); NWF Exh. 13 at ¶¶ 7-10 (Second Pettit Dec.). As noted there, the plaintiffs' request for additional spill involves a spread-the-risk operation as compared to operations under the UPA. Spread-the-risk operations also better address the uncertainty of the data in general by using multiple avenues for downstream juvenile migration rather than relying exclusively on one avenue in the face of uncertainty. See Federal Stay Exh. K at D-14 (recognizing that "[p]roviding both spill and transportation is a method to balance the potential risks that might arise from relying solely on transportation as a management tool. Spill reduces the percentage of fish transported and increases the survival of the fish migrating in-river" but refusing to apply this approach to the summer migration season).

15. The parties seeking a stay of the district court injunction assert that the additional spill allowed by the injunction will cause dissolved gas problems that could harm juvenile salmon. See Fed. Stay Exh. F at ¶¶ 38-42. While these concerns were raised before the district court and addressed in several declarations filed there, and while the plaintiffs have been clear that they only sought additional spill within the limits of the state water quality standard dissolved gas caps, the federal agencies and BPA Customer Group continue to raise this issue. Since the district court's order of June 10, 2005, the federal, state, and tribal technical staffs have met together to discuss and

prepare a plan for complying with the injunction order that would avoid any dissolved gas problems associated with increased spill at the Snake River projects and McNary to the level allowed by the injunction by spilling to the level of the injunction or to level of the dissolved gas caps, whichever is lower. This approach is described in the attached proposed operations provided by the Corps to technical staff and the plaintiffs on June 16, 2005. See Exhibit 1. These discussions also have confirmed that the injunction will not prevent research from going forward this summer. Id.

16. In addition, the technical discussions about implementing the district court's injunction have further confirmed the view of fisheries scientists that increased spill this summer as allowed by the injunction likely will improve juvenile salmon survival and reduce the harm these fish would otherwise face. I have attached as Exhibit 2 to this declaration a June 14, 2005, memorandum from the Fish Passage Center that addresses injunction operations and salmon survival among other issues. The Fish Passage Center is a technical resource for the Columbia Basin federal, state, and tribal fishery agencies established under the 1980 Northwest Power and Planning Act. The Center provides fish passage information and analyses on hydrosystem operations and river conditions and coordinates the agencies

and tribes in providing recommendations to the dam operators that will best protect salmon.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 17th day of June, 2005, at Portland, OR.

Thomas K. Lorz

THOMAS K. LORZ